

Minutes of the
Nebraska Water Policy Task Force
February 8, 2006
Cornhusker Hotel, Lincoln, Nebraska

Attendance

Task Force Members:

Brian Barels	Tom Schwarz	Dave Sands
Lloyd Nellor	Al Schmidt	Lorrie Benson
Greg Whitmore	John Turnbull	Curt Friesen
Jim Miller	Steve Huggenburger	Gary Mader
Duane Sugden	Duane Hovorka	Nancy Eberle
Dennis Strauch	Clint Johannes	Don Suda
Dan Smith	Ron Bishop	Dick Mercer
Don Kraus	Gloria Erickson	Richard Uhrenholdt
Nelson Trambley	Lyle Heinrichs	John Burke
Patrick Heath	Lumir Jedlicka	Ann Bleed
Senator Ed Schrock		

Others:

Dean Edson	Don Blankenau	John Thorburn
David Kracman	Russ Callan	Don Adams
Steve Smith	Ann Diers	Jonathan Bartsch
Steve Gaul		

Call to Order/Administrative

Jonathan Bartsch called the meeting to order at 9:35 a.m. He said that when the meeting had been scheduled in December it was anticipated that funding issues and legislation would need to be discussed at this meeting. He also noted that there had been some confusion concerning a task force recommendation on increasing selected NRD levies by 3¢ per \$100 and that he hoped that would be addressed.

Federal Activity

Nancy Eberle reported on federal activity related to noxious weeds, carbon credits and a special initiative for Pumpkin Creek. She noted that even though landowners had signed up for the Conservation Reserve Enhancement Program (CREP) land was still eligible to apply for carbon credits through the Iowa Farm Bureau Management Corporation in West Des Moines. The contracts are for five years although there would now only be four years left.

Eberle stated that the Special Initiative for Pumpkin Creek would supply EQIP funds to landowners who have retired acres. Sign-up has a very short February timeframe and must be made at USDA offices in Bridgeport, Harrisburg or Scottsbluff. Bleed said that she had brought

the issue of potential state funding for Pumpkin Creek irrigated land retirement before the task force and that the task force had suggested with some provisions that the funding was appropriate. She noted that a decision had been made to go ahead with \$187,500 in state funding to match \$187,500 in local funding for Pumpkin Creek cost-share.

Legislative Update

Dean Edson, Nebraska Association of Resources Districts, provided the task force with an update on natural resources related legislation being considered in the current session of the Unicameral. He indicated that the session was currently at day 23 out of a 60-day session and that LB 933, which changes water resources provisions and provides for domestic water supplies, had not yet received a priority. One task force member asked whether municipal interests had made an effort to advance LB 933. Another reported that they had but that there was no answer yet. Edson noted that LB 805 had been included as an amendment to LB 933 and corrects a technical problem the Appropriations Committee had with water funding. He indicated that other funds have programs that oversee their operations. This would provide a program structure to the water funds for oversight purposes.

Edson also reported that some legislators had expressed concerns about using general fund dollars to pay farmers not to irrigate in the Republican. He pointed out that the Lincoln Journal-Star had just printed an editorial expressing concern about use of general fund dollars on water programs. He said that NARD has been working diligently to get more money into water programs. He noted that under LB 1060, the Governor's budget would put \$3½ million into water programs and that LB 1077, Senator Schrock's bill would add \$10 million to that. He said that he didn't know yet what would pass but that his best estimate is that there would be between \$3½ million and \$5 million in the budget bill.

A task force member asked what the issue was in not wanting to take money out of the general fund. Edson replied that Senator Beutler's philosophy is to utilize user funds, not general funds. Another member asked whether water resources was getting a priority, or was just another issue. Edson replied that the Governor had said that water is the issue of the decade in his state of the state speech and that more water lobbyists are being hired. He said water resources are at the point of gaining more attention. An audience member said that there has to be a Lincoln or Omaha senator who will prioritize LB 933 for municipalities. Don Blankenau said that he is fully confident it will be prioritized.

Edson said that a number of questions have been raised about LB 971 which would increase NRD levy authority by up to 3¢. He said there were questions as to whether it was intended in both fully and overappropriated basins and whether it was intended to be pooled. He noted that it would not be NARD's intent to have it pooled ahead of time although NRDs could later decide to do so if they wished.

A natural resources district manager noted that this would allow an 8½¢ levy in those districts that have fully or overappropriated area and that the levy could apply to the entire NRD. He said that if taxes are almost doubled and the money moves out of the district the public will be very reluctant. He indicated he doesn't agree with taking 3¢ from one district and then sending it

outside of the district. A task force member reported that every year NRD boards take heat when they set their budgets. He stated that the idea of the 3¢ had been to put financial abilities in the hands of the Boards that would need it for match. He said that he could not imagine an NRD Board voting to increase their levy by 3¢ and then sending the money to another district. A task force member/NRD manager indicated that it had never been envisioned that the 3¢ would be pooled, but there was also nothing to prevent districts from joining a basinwide interlocal agreement.

A task force member asked whether it would be constitutional to give away the funds if a benefit was not incurred. Edson replied that pooling does raise the constitutionality question. Bartsch asked for a show of hands on whether Task Force members agreed that their intent had been that the money was to be used in the district itself. No one disagreed.

On another issue, Edson indicated that the current 2 to 1 match rates poses issues and that there will be an attempt to get 20% match. Dave Sands reported that LB 997, a transferable tax credit bill, had been introduced by Beutler. The bill would allow tax credits for a variety of environmentally related land uses, including retirement of irrigated acres, endangered species habitat and others. The bill would allow a tax credit of 50% of the reduction in value and could be sold. He said that there had been no opposition at the hearing and that the bill had been supported by a variety of groups including cities and the NARD. However, Sands later talked with Senator Landis of the Revenue Committee who indicated the bill probably would have been killed that evening if it were not for the water provisions. Sands indicated there is a pervasive attitude that people don't want to spend state-wide money on problems that were created out west and that the problems are local problems. He encouraged Water Policy Task Force members to talk about the issue as a "state problem".

LB 1226 Presentation/Discussion

Don Blankenau distributed a handout (attached) on LB 1226 and indicated that the bill was up for a hearing the following day. The bill is intended to address concerns that have occurred in implementation of LB 962. He noted that the bill had seven distinct and non-interrelated parts. Blankenau said that the first component deals with instream flow and that the question was whether instream flow rights provide the full benefit they were granted for and if not, the standard to use on subsequent rights. Edson said the provision was placed in partly to allow the committee to provide suggested amendments and still pass a bill if needed. Bartsch noted that the Committee had previously been considering a rule change and not a legislative fix.

Blankenau reported that the second suggested change was to address concerns that an NRD may issue a moratorium on new wells while DNR continues to issue additional surface water rights which can result in a fully appropriated status. He said the concept was to allow NRDs to request DNR stop the issuance of new surface water rights and have that be in the public interest.

Bleed reported that when the Upper Niobrara White NRD declared a moratorium on wells in the eastern portion of the NRD they wanted DNR to declare a moratorium on new surface water rights, but there were legal concerns about the ability to do so. She suggested the following language to address the issue "if an NRD puts a moratorium or allocation on groundwater and

they ask DNR to put a stay on surface water rights, DNR may find it is in the public interest to do so.”

A task force member suggested that a blanket stay could prevent storage water or groundwater transfers from being brought into the basin and there needs to be the ability for exceptions. He suggested the stay should be based upon an evaluation or determination by the Department. A natural resources district manager indicated that some surface water users had said for years that groundwater development needed to be cut off to protect surface water. He said that now that groundwater users want no new surface water use after groundwater is cut off surface water users don't support it. The NRD manager noted that stays would be in place until an IMP was in place and that then there can be variances. A task force member indicated that the current language just said stay. Another member stated that was one of the areas where language needed to be cleaned up.

Blankenau reported that the third item in LB 1226 would raise the standard for determinations of fully appropriated status to require that conclusions and results in the report “are accurate to a reasonable degree of scientific certainty.” Edson indicated that the districts are concerned about getting sued by water users. He said they are afraid that determinations will be thrown out in court and they are trying to shore up the law.

One task force member expressed concern that the new language would remove the proactive elements of LB 962. Another said that the current language provides a definable standard of best available information. A third member said that he was concerned he didn't know a modeler who would testify with the proposed standard. Another agreed that best available information was more definable and said the proposal may be the ‘full employment for water lawyers act’. One member stated a concern that if the proposed language were implemented it would also cause harm. He said that someone could be harmed whether you act quickly or wait for more certain information – it cuts both ways.

One task force member asked where LB 1226 came from. Blankenau replied it is an NRD bill aimed at defining questions in LB 962. Edson noted that when the bill was introduced they were criticized for not bringing it before the task force and that is why they were there. A task force member/NRD manager said there needs to be some knowledge that what is being used is reasonably scientifically accurate. He felt that when well development is to be shut down at least 3 to 5 years there needs to be some assurance that what is being proposed is supportable.

One member said he feared this would set up a scenario where people would always say “that's fine but we need better information.” Another member expressed concern that there was nothing in the statute that would go back and limit overuse from development that occurred while the situation was being studied.

Blankenau explained that the fourth provision of the bill would replace the “reasonably foreseeable future” language in the current bill with a specific 10-year timeframe for the evaluation. He indicated that it isn't feasible to predict beyond 10 years. A task force member indicated that the law in Colorado has withstood legal challenges and asked why it would not here. Blankenau responded that Colorado had shifted the burden of proof to the objectors.

Another member questioned why 40 years would be used in one portion of the law while 10 years is used in another.

Edson indicated that the fifth change proposed by LB 1226 would require DNR to notify Districts of any determinations made by certified mail. He said notifications had occurred by e-mail this last December. Bleed indicated she had no problem with the proposed change.

Edson reported that the sixth proposed change would clarify that well permits existing prior to a determination would be subject to conditions imposed by the district and would need to be completed in the one-year timeframe allowed under the permit. He pointed out that in the Loup and Elkhorn basins there had been a rush for well permits and there had been no way to condition them.

There was considerable discussion over current statutory language that was characterized as exempting wells drilled nine months prior to the determination date but providing no ability for an NRD to put conditions on that well if later there is a determination of fully appropriated.. Edson said that some people had been irrigating in October just to get around the law. A task force member indicated that the nine month provision in LB 962 had created problems. A task force member/NRD manager reported that the nine month provision is in the statutes because of concern that a landowner would never be able to use their wells because they had never been pumped even though they have an investment prior to designation.

Edson reported that the seventh provision of LB 1226 would be to exempt water users in areas not hydrologically connected from regulation unless required by a compact or if the natural resources district chooses to add all users in the district. It would also clarify that an area's water use would be subject to only one management plan. Edson said that he was concerned about making something subject to the water management plan of 3 or 4 Boards. He said that the Lower Platte North NRD had taken a beating on the Omaha wellfield issue. Bleed indicated that a couple of issues were being confused. She stated that her belief was that a user would only need to comply with one plan under current statutes. However, she said the second issue is whether an NRD's plan should have to account for impacts in another NRD, and she believes that it should.

Bartsch summarized by saying that there seemed to be task force interest in discussion and pursuing concepts around proposals #2, 6 and 7. However, there was no agreement on proposals 1, 3 and 4. No one had indicated a problem on the fifth proposal. Bartsch asked the group who would like to work with Edson to clarify proposals 2, 5, 6 and 7. The task force agreed to individually raise their concerns with Edson to help understand their concerns, rather than form separate committee.

Additional Discussion on Legislation

Edson reported that the issue of using 28% depletion in 40 years versus 10% in 50 years had been split into a separate bill, LB 1225. A task force member/NRD manager indicated that 28/40 had been used in the Cooperative Agreement and was part of the process when overappropriated

areas were designated. He said that LB 1225 would go back and establish the use of 28/40 by law.

Schrock said that he could guarantee LB 933 would receive a priority. He also said it was possible there would be \$5 million per year in interrelated water management funding. However, he indicated he didn't know yet what Bostwick Irrigation District would do concerning proposals to fund use of some of their water.

Role of the Task Force

Bartsch asked for discussion of the future role of the task force. He reported on the statutory language on the task force related to task force duties. He also asked whether legislation needed to come through the group.

One task force member indicated that one function of the task force is to provide a forum. A member from environmental interests said that he felt LB 962 had been a package deal and that to make some of the types of changes proposed this soon afterwards was breaking faith with the package. He asked if there was no instream flow protection why should he support money for irrigators out west. He said the time to discuss these proposals was last December and to see them the day before the hearing doesn't do much good. He indicated that LB 962 had elevated water quantity issues to the level of the front page and that he would also like to see water quality on the front page. An NRD manager and a task force member indicated that water quantity issues were enough for the task force and a participant said that if a water quality task force would be formed it wouldn't have the same membership as this task force. A task force member/NRD manager said the water quality issue was not in the group's charge and that he didn't know if the group could ever review all the potential water quantity legislation that could come before the group and he was not sure if they should. Additionally, it was noted that the composition of the task force does not include those needed for a water quality discussion/recommendations. He said the group had 18 months to get a job done and completed it. He was unsure if the group had anywhere else to go and said he did not see a direction. Another member suggested that one possible direction was education. However, it was questioned whether that was in the group's charge.

An NRD manager later noted that bringing items before the task force did not always produce action. He said that his NRD had brought items before the group that had been placed in the "parking lot."

A task force member reported that one issue still outstanding was that the instream flow subcommittee needed to come back to the task force. It was later suggested that the Task Force might be in a better position to address issues after the legislative session because they would know what had been done on funding and other issues. A member asked who would be better to consider changes to LB 962 to deal with unintended consequences.

Next Meetings – Agenda and Dates

After some discussion agenda items suggested for the next task force meeting included: funding, the report of the instream flow subcommittee, changes to LB 962, future direction for the task force and parking lot issues. The parking lot issues were to be explored ahead of time by subcommittees or individuals who would report back to the task force. They included: (1) the required date for achieving a balance between supply and use (to be addressed by the sustainability subcommittee), (2) water banking, (3) Trust Fund rules (Glock and the funding subcommittee), (4) requirements related to allocation of groundwater use on date of first irrigation (Thorburn), and (5) mechanisms for funding and administering intentional groundwater recharge projects (Barels). One member suggested that before the meeting these issues be outlined through a definition of the problem, and an exploration of issues and options and that these write-ups be sent to the task force prior to the meeting. A member also suggested that notice be sent to the persons chairing the efforts on parking lot issues.

Dates were suggested for two future task force meetings. The time suggested for the first meeting was 9:30 a.m. to 3:00 p.m., Wednesday, May 31 in North Platte. The time suggested for the second meeting was 9:00 a.m. to 4:00 p.m., Tuesday August 15. It was suggested this meeting be held in conjunction with a Water Policy Task Force tour. Although a specific place and basin was not chosen, the eastern basins and the Loup Basin were suggested by some members. The meeting adjourned at 2:10 p.m.